Koh Thong Kuang v United Malayan Banking Corp Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-178-94
MOHAMED AZMI, MOHAMED DZAIDDIN SCJJ AND VC GEORGE J
6 SEPTEMBER 1994

Bankruptcy *— Notice — Substituted service — Whether properly obtained — Whether petitioner aware that respondent was residing out of jurisdiction — Whether petitioner entitled to serve notice at last-known address although aware respondent no longer residing there — Practice Note No 1 of 1968*

The appellant was sued on a guarantee given to the respondent ('the bank'). The bank obtained judgment against the appellant and, subsequently, an order for substituted service of the bankruptcy notice. Two days after the effective date of the substituted service, the appellant affirmed his affidavit to set aside the bankruptcy notice on the ground that the order for substituted service had been improperly obtained because the bank was aware that he had resided in England for the preceding six years by virtue of previous bankruptcy proceedings brought against him. The application was dismissed by the senior assistant registrar and also by the judge on appeal. The appellant has further appealed. The court proceeded to hear the appeal although it was of the opinion that the application should have been to set aside the order for substituted service and not the bankruptcy notice.

Held, dismissing the appeal:

(1) There was nothing in the previous bankruptcy proceedings which showed that the bank was or should have been aware that the appellant had resided in England for the previous six years.

(2) From the evidence, the bank was justified in concluding that the appellant was deliberately evading service and was entitled to serve the bankruptcy notice at his last-known address although it was clear that he was no longer residing there. The fact that the appellant was able to affirm his affidavit two days after substituted service was effected demonstrated the efficacy of the substituted service procedures provided by the rules.

Per curiam:

Practice Note No 1 of 1968 should not be applied blindly but mutatis mutandis the facts of each situation.

[Bahasa Malaysia summary

Perayu telah didakwa atas suatu gerenti yang telah diberikan kepada responden ('bank itu'). Bank itu telah mendapatkan penghakiman terhadap perayu dan, kemudiannya, suatu perintah untuk

penyampaian ganti notis kebankrapan. Dua hari selepas tarikh berkesan penyampaian ganti itu, perayu telah mengikrarkan afidavitnya untuk mengetepikan notis kebankrapan atas dasar bahawa perintah penyampaian ganti itu telah diperolehi secara tidak wajar kerana bank itu sedar bahawa beliau telah bermastautin di England semenjak enam tahun yang lalu memandangkan prosiding kebankrapan terdahulu yang telah dibawa terhadap beliau. Permohonan itu telah ditolak oleh penolong kanan pendaftar dan juga oleh hakim rayuan. Perayu telah membuat rayuan selanjutnya. Mahkamah terus mendengar rayuan itu walaupun ia berpendapat bahawa permohonan itu seharusnya dibuat untuk mengetepikan perintah penyampaian ganti itu dan bukannya notis kebankrapan tersebut.

Diputuskan, menolak rayuan itu:

(1) Tidak ada apa-apa di dalam prosiding kebankrapan terdahulu yang menunjukkan bahawa bank itu sedar ataupun sepatutnya sedar bahawa perayu telah bermastautin di England semenjak enam tahun yang lalu.

(2) Daripada keterangan, bank itu berjustifikasi membuat kesimpulan bahawa perayu dengan sengaja mengelak penyampaian dan berhak menyampaikan notis kebankrapan pada alamat beliau yang terakhir diketahui walaupun ianya jelas bahawa beliau tidak lagi tinggal di sana. Hakikat bahawa perayu itu berupaya mengikrarkan afidavitnya dua hari selepas penyampaian ganti itu dilaksanakan menunjukkan keberkesanan prosedur penyampaian ganti yang diperuntukkan oleh kaedah-kaedah.

Per curiam:

Nota Amalan No 1 Tahun 1968 tidak seharusnya digunakan secara membabi buta tetapi secara mutatis mutandis mengikut fakta setiap keadaan.]

Notes

For cases on substituted service of bankruptcy notices, see 1 *Mallal's Digest* (4th Ed) paras 1077–1080.

Case referred to

Re Peh Kong Wan [1992] 2 MLJ 292 (distd)

Ranjit Singh (*Cheang & Ariff*) for the appellant.
T Thomas (*Skrine & Co*) for the respondent.

VC George J (delivering the grounds of judgment of the court): This appeal was dismissed with costs. We now give our reasons for having done so.

The appeal was said to turn on the one issue, whether the service of the bankruptcy notice on the appellant was good service. It turned out that

A the real bone of contention was the appellant's complaint that the order for substituted service had been improperly obtained.

The petitioner bank, the respondent in the appeal, had obtained judgment against the appellant in the High Court at Kuala Lumpur on 15 December 1989 for RM4,024,013.85, interest and costs — the appellant B had been sued as a guarantor of a customer of the bank. In the letter of guarantee, the appellant's address is given as No 146, Jalan Maarof, Bangsar, Kuala Lumpur.

The petitioner had obtained an order for substituted service ('SS') of the bankruptcy notice pursuant to which service was to be effected on the C appellant by posting a copy of the notice and of the order for SS on the notice board of the court and also on a conspicuous part of the premises known as No 146, Jalan Maarof, Bangsar, 59000 KL, on the basis that that was the last address of the said judgment debtor (ie the appellant) known to the bank and by advertisement in one issue of any daily newspaper. The SS was purported to be effected in terms of the order, the required D advertisement being in an issue of *The Malay Mail*, the effective date of the SS being 7 April 1993. Two days later, on 9 April 1993, the appellant affirmed his 'affidavit on an application to set aside bankruptcy notice'. It was affirmed in Kuala Lumpur before a commissioner for oaths.

Now, as the real bone of contention of the appellant is that the order E for substituted service should not have been given, the application should have been for an order setting aside the order for SS and not as is the case here, for the bankruptcy notice to be set aside. However we decided to deal with the appeal on the basis that in fact the real bone of contention (ie the propriety of the order for SS), was before the learned registrar, the F learned judge in the High Court and before us.

The application for SS was made on the basis that it was not possible to effect personal service of the notice on the judgment debtor as at all relevant times his whereabouts were not known to the petitioner on whose behalf it was said that the last-known address of the appellant as far as the G petitioner and its solicitors were concerned was No 146, Jalan Maarof, Bangsar, 59000 Kuala Lumpur.

The process server in attempting to serve the bankruptcy notice on the appellant at that address had been told by an occupant of the premises that the appellant had shifted from there. The process server had thereafter, in purported compliance with Practice Note No 1 of 1968, sent a letter of H appointment addressed to the appellant at the No 146, Jalan Maarof address (presumably on the basis that he might after all be there) and pursuant to it duly called at the address on the appointed day which was Tuesday, 16 June 1993, to find the premises locked. He called out the name of the appellant but nobody answered. The letter of appointment I eventually was returned to the petitioner's solicitors endorsed 'Pindah/ left'.

The appellant contends by his affidavit of 9 April 1993 that for the previous six years he had resided in England. He says that the petitioner

and/or its solicitor 'are fully aware of the above by virtue of previous bankruptcy proceedings taken against me vide No D5–29–2400–91'. A

It turned out that there had indeed been an earlier petition taken out by the instant petitioner in respect of the same judgment debt relied on in the instant petition. There, in applying for SS, the appellant's last-known address was erroneously given by the appellant as No 145, Jalan Maarof instead of No 146. When the appellant applied to set aside the bankruptcy notice in that petition on the basis of the error made in respect of the address at Jalan Maarof, the bank conceded that the order for SS was bad as the respondent's last-known address was No 146 and not No 145 and accordingly, the petition was withdrawn and it was thereafter that the bank commenced the instant bankruptcy proceedings. It is to be noted that contrary to the appellant's contention in his said affidavit, in fact there does not appear to be anything to be relied on in the previous bankruptcy proceedings which shows that the petitioner and/or its solicitors were or should have been aware that the respondent had resided in England for the previous six years. B C D

Now, it would seem that the appellant, although he had, in providing the continuing letter of guarantee, given his address therein as No 146, Jalan Maarof, had not informed the bank of his new address when he moved out of No 146. No doubt in anticipation of that happening, the letter of guarantee had in it a provision that notices could be sent by the bank to the guarantor's last-known address. E

In the said affidavit of 9 April 1993, the appellant states on oath that he resides at 15, Bolton Street, London, England; in another affidavit affirmed on 16 July 1993, he states on oath that his residential address is 14 Condray Place, London SW11 3 PE. In a sale and purchase agreement dated 22 April 1989, his address is given as No 8, Chendrai Lucky Garden, Kuala Lumpur. A letter from his London solicitors shows that the 15, Bolton Street address is in fact their address. It is obviously unlikely that he resided at that address. In yet another affidavit, this time by his solicitor, one RG Hillman, the deponent states that he had been advised by the appellant that he resides at No 7 Little Cedars, Finchley, England! F G

Now, inter alia, the contents of the appellant's passport which is a Malaysian passport, some of the affidavits filed on his behalf and the sale and purchase agreement in respect of No 146, Jalan Maarof, all serve to show that the appellant had, at all relevant times, been in and out of Malaysia frequently. There is evidence that between 1989 and 1993, he had entered or he had been in Malaysia on at least 14 different dates. H

We are of the opinion that the bank and its solicitors were justified in concluding as they did that the appellant was deliberately evading service and, in the face of the various addresses he had given as being his residential addresses, were entitled, in directing their mind as to what the last-known address of the appellant was, to decide on the No 146, Jalan Maarof address although it was clear that he was no more residing at that address. I

When the application for SS was made, there was nothing which reliably suggested to the bank or its solicitors that the appellant had

A permanently moved out of Malaysia. This was unlike the case of the applicant in *Re Peh Kong Wan* [1992] 2 MLJ 292, the judgment in which case was cited to us. In that case, the real issue for adjudication was whether the applicant, at the time the bankruptcy petition was presented against him, was domiciled in Malaysia. Whether the bank there was aware of the applicant's domicil was not really an issue.

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In *Re Peh Kon Wan* it was pointed out at p 296 that:

> ... in respect of applications for substituted service where it is known or ought to be known that the respondent has ceased to reside in the last-known address (as was the case here), the registrar should be provided with some evidence as to the probable whereabouts of the respondent. The petitioner should make reasonable inquiries as to the whereabouts of the respondent and if it is suspected that he is out of the jurisdiction, that suspicion should be brought to the attention of the court so the order for substituted service could be formulated to the end that the respondent will, in all probability, get to know of the fact of the bankruptcy notice or the presentation of the petition as the case may be.

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In the instant case, as has been seen, the evidence available to the bank and its solicitors was that the appellant had addresses both in England and in Malaysia and was frequently travelling from Malaysia to England and back to Malaysia or vice versa. It would seem that an advertisement in either the English or Malaysian newspapers would in all probability have been equally effective to give him notice of the proceedings. As it turned out the appellant had been aware, within two days of the effective date of the SS of the bankruptcy notice, of its existence and was able to have affirmed and filed the affidavit in support by which he sought to have it set aside. This demonstrates the efficacy of the SS procedures provided by the rules and streamlined as it were by Practice Note No 1 of 1968 which we would exhort should be applied not blindly but mutatis mutandis the facts of each situation.

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In the circumstances, we had no doubt that the learned registrar was perfectly justified in dismissing the application as was the learned judge in dismissing the appeal from the registrar's decision. The appeal was accordingly dismissed with costs.

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Appeal dismissed.

Reported by Prof Ahmad Ibrahim

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